

LYING AND FREEDOM OF SPEECH

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I. INTRODUCTION

Lies, it has been thought, have in themselves no First Amendment value. The Supreme Court has famously maintained, more broadly, that “there is no constitutional value in false statements of fact.”¹ This language has frequently been repeated by the Supreme Court itself² and by other courts.³ Elsewhere, the Court has maintained that “[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas.”⁴

Distinguishing among different kinds of false statements of fact, the Court has argued that “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁵ The intentional lie and the careless error are said to be “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁶

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¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *But see* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”).

² *E.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 783 n.3 (1986) (Stevens, J., dissenting); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 n.22 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770, 776 (1984); *Herbert v. Lando*, 441 U.S. 153, 171 (1979); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring); *Time, Inc. v. Firestone*, 424 U.S. 448, 482 (1976) (White, J., dissenting).

³ See, for example, the especially interesting factual and legal context of the “Stolen Valor” Act case of *United States v. Alvarez*, 617 F.3d 1198, 1206, 1212 n.12 (9th Cir. 2010), *cert. granted*, 181 L. Ed. 2d 292 (U.S. Oct. 17, 2011) (No. 11-210) (statutory criminalization of the false oral or written claim to have been awarded a particular military service medal). One example of the numerous other federal and state court opinions quoting the *Gertz* language is *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 616 (6th Cir. 2009).

⁴ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

⁵ *Gertz*, 418 U.S. at 340 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁶ *Id.* at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Thus any free speech protection accorded to false statements of fact—let alone to intentional lies⁷—is justified on pragmatic, merely instrumental grounds, rather than as a matter of principle. For the sake of avoiding “intolerable self-censorship”⁸ and the excessive deterrence of requiring entirely true speech, “we protect some falsehood in order to protect speech that matters.”⁹ This protection is ultimately a matter of judicial calculation and strategy,¹⁰ given the risks and uncertainties faced by good-faith speakers. It is said that some lies need to be protected in order to provide “breathing space”¹¹ for uninhibited, good faith, responsible speech.

In the end, though, we are left with the near-truism that lies in themselves have no free speech value, beyond their negative free speech value in polluting and distorting public disclosure.¹² Ironically, this belief, however popular, is itself false.

The falsity of the claim that lies are inherently without direct and substantial free speech value is the main thesis of this Article. Lies may contribute directly and substantially to the basic values or purposes underlying freedom of speech in general.¹³ These include, but are not limited to, autonomy, personal development, truth, privacy, tolerance, respect, dignity, and equality. Some lies may promote free speech values in such a way as to deserve free speech protection.¹⁴ And this is quite apart from any “breathing space”¹⁵ that protecting some false statement—if not some lies—might provide for good faith speakers.

Part II of this Article examines a recent, intriguing example of an alleged lie in a legal context drawn from a variety of related false, fraudulent, misleading, deceptive, or perjurious statements. As it turns out, it is an understandable wish to be able to analytically place all lies somewhere on a simple continuum, but that is doomed. As a concept, lying is a matter of astounding subtlety and complexity. It is probably more accurate to think of lies, collectively, as occupying positions on a nearly infinite gradient. That gradient, in turn, constitutes only a portion of a further, nearly infinite gradient necessary to locate the full variety of lies, false

⁷ For clarification of the admittedly vague idea of a ‘lie’ that is sufficient for our purposes, see *infra* Part III.

⁸ *Gertz*, 418 U.S. at 340.

⁹ *Id.* at 341.

¹⁰ *Id.* at 342.

¹¹ See *id.* at 354 (Blackmun, J., concurring).

¹² See *supra* notes 1–6 and accompanying text.

¹³ For reference to widely cited free speech values or purposes, see *infra* Part IV.

¹⁴ Even assuming a lie’s value in promoting freedom of speech, whether it should be constitutionally protected from any legal penalty will often depend upon the nature of the regulation and the weight of any countervailing government interests. For a general discussion of content-based restrictions on speech, see Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199 (1994).

¹⁵ See *supra* note 11 and accompanying text.

statements, fraudulent statements, misleading statements, deceptive statements, and perjurious or other related sorts of statements.

Part III of this Article provides background to identify some general alternative perspectives on lying, and to add rigor and precision to the discussion. First, the work of some of the most influential writers on the subject of lying are sampled,¹⁶ including the classic historical discussions of the nature and value—or disvalue—of lying.¹⁷ Second, attention is devoted specifically to the influential work of philosopher Immanuel Kant.¹⁸ Finally, some of the very careful analytical and normative work of contemporary writers is reviewed, including philosophers, law professors, and social scientists—as well as some current disputes over the very definition and meaning of lying.¹⁹ Comments in this section apply the ideas of these different thinkers on the fugitive slave and Shoah cases described below.

Part IV is the emotional center of the Article. It recounts clear instances of intentional lying to both private parties and government officials in two dramatic and extreme, though clearly important, historical contexts.²⁰ The first involves intentional lies in the context of attempts to re-capture and “return” escaped fugitive slaves throughout the period ending with the American Civil War (“fugitive slave cases”).²¹ The second involves intentional lies, mainly to Nazi governmental or military officials, in the context of attempts to hide or otherwise protect mostly Jewish citizens from being sent to concentration and extermination camps over the course of the Second World War (“Shoah cases”).²²

Part V discusses the basic values and purposes thought to be promoted by, and to thereby justify, a regime of freedom of speech.²³ Specifically, the discussion addresses whether a number of the lies, on any familiar definition,²⁴ told in the fugitive slave and Shoah cases could quite reasonably be described as distinctly advancing one or more of the basic free speech values and purposes. Indeed, in

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part III.A.

¹⁸ See *infra* Part III.B.

¹⁹ See *infra* Part III.C. As we shall see, however, it will not be crucial for our purposes whether we have correctly interpreted the work of any writer, including Kant, or even whether we arrive at a precise, detailed, or consensually convincing definition of lying. For our purposes, almost any plausible definition of lying, drawn from among the many possible candidates, should suffice to make our key points.

²⁰ See *infra* Part IV. Our references to “intentional” lying probably involve a logical redundancy, but reference to intentional or deliberate lies may sometimes add emphasis, if not clarity.

²¹ See *infra* Part IV.A.

²² See *infra* Part IV.B.

²³ See *infra* Part V.

²⁴ It is sometimes suggested that a lie told to someone who has no moral right to be told the truth is not a justified lie, but is simply, not a lie at all. This approach begins with the murky idea of forfeiting the right to the truth, or at least the right to not be lied to. It does not correspond especially well with our ordinary usages and strikes many of us as mainly an expedient intended to save a supposedly absolutist and morally disturbing rule against lying. See *infra* Part III.

many of the examples considered, this is consistently the case. This Article concludes that lying in such cases, taken individually or collectively, often substantially advances several of the basic free speech values.²⁵ The general conclusion will also apply to closer calls in related, but less extreme contexts. In summary, this Article will establish that some intentional lies, in themselves, are worthy of protection on free speech grounds.

II. LYING AND RELATED COMMUNICATIONS IN LEGAL CONTEXTS: AN INTRIGUING CASE

It would seem the law's regulation of lying and related sorts of communication occurs in nearly every general legal context—civil and criminal.²⁶ A particularly interesting constitutional controversy currently drawing judicial attention involves a federal criminal statute known as the “Stolen Valor Act.”²⁷ The Act provides in part,

[w]hoever falsely²⁸ represents himself or herself, verbally²⁹ or in writing, to have been awarded any decoration or medal authorized by

²⁵ See *infra* Part VI.

²⁶ See, e.g., *United States v. Wells*, 519 U.S. 482, 491 (1997) (finding conviction for making a false statement to a federally insured bank does not require a showing of the materiality of the statement at issue). For the legal consequences of undercover journalistic investigations involving multiple forms of alleged deception—beyond that of say, mere real estate “testers”—see *Food Lion, Inc., v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999) (alleged use of false identities, references, and addresses by investigative reporters); *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1348 (7th Cir. 1995) (alleged promise of no “undercover surveillance”). For the generally defamatory quality of a published assertion that a person is “a liar,” see *Colvard v. Black*, 36 S.E. 80, 81–82 (Ga. 1900). For a discussion of the general federal criminal perjury statute, 18 U.S.C. § 1621, see, for example, *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (“A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”); *United States v. Gorman*, 613 F.3d 711, 715–16 (7th Cir. 2010) (perjury case involving ambiguity of language); see also *State v. Elnicki*, 105 P.3d 1222, 1234 (Kan. 2005) (finding prosecutor’s references to the defendant as a ‘liar’ or related euphemisms as improper). For some relevant commentary, see Tristan S. Breedlove, *Perjury*, 46 AM. CRIM. L. REV. 899, 903–13 (2009); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 159–60 (2001); Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 145–46 (2009) (describing lying by various actors in the trial process).

²⁷ See Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (codified as amended at 18 U.S.C. § 704 (2006)).

²⁸ Note that the statutory text makes no reference to whether the speaker must have known or intended the representation to be false. See 18 U.S.C. § 704(b). The majority of scholars would probably hold that a false statement not known by the speaker to be false

Congress for the Armed Forces of the United States . . . or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.³⁰

Interestingly, the statute does not require, in an individual case, a showing of any particular harm to any person or group, including to those authorized to wear the medal in question, to medal recipients in general, or to anyone somehow competitively disadvantaged by the defendant's false representation.³¹ As indicated by Congress, "the purpose of [the Act] is to 'protect the reputation and meaning of military medals and decorations.'"³²

Presumably, the main congressional concern in omitting any required individualized proof of harm is the belief in a diffuse pollution, dilution, devaluation, or symbolic but cognizable injury, long-term in its nature, with the gradually cumulating harms not realistically traceable to any particular defendant's false representation. In this context, however, the Ninth Circuit has concluded:

The sad fact is, most people lie³³ about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech.³⁴

In this case, the panel majority was concerned about the possibility of criminalizing a wide range of commonly told lies.³⁵ They found no well-

would not, in most typical cases, count as a lie in a strict, rigorous sense. *See infra* Part III.C.

²⁹ While verbal communication can take place in writing, or electronically, this statutory reference to "verbal" representations is probably intended to refer mainly to oral representations. *See* THE NEW FOWLER'S MODERN ENGLISH USAGE 820–21 (H.W. Fowler & R.W. Burchfield eds., 3d ed. 1996).

³⁰ 18 U. S. C. § 704(b).

³¹ *See id.*; *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *cert. granted*, 181 L. Ed. 2d 292 (U.S. Oct. 17, 2011) (No. 11-210).

³² *United States v. Perelman*, 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010) (decided two days after the release of the opinion in *Alvarez*, and adopting a contrasting approach to the free speech issues); *see also* Carri Geer Thevenot, *Man Sentenced to Prison for Military Benefits Fraud*, LAS VEGAS REVIEW-JOURNAL, Dec. 1, 2010, at B1, available at www.lvrj.com.

³³ Again, not all provably false assertions of matters of fact are lies in any rigorous sense. *See supra* note 28 and *infra* Part III.

³⁴ *Alvarez*, 617 F.3d at 1200.

³⁵ *See id.* at 1217. Some possible purposes of lying include:

Saints may always tell the truth, but for mortals living means lying We lie to protect our privacy ("No, I don't live around here"); to avoid hurt feelings

established, narrow class of legally unprotected lies to be present,³⁶ and they found, perhaps controversially,³⁷ that the Stolen Valor Act's restriction on speech was content-based rather than content-neutral.³⁸ The court applied strict scrutiny³⁹ and struck down the statute under the free speech clause.⁴⁰

The primary concern herein is not with the proper disposition of such cases. Instead, it is merely one of noticing recurring themes, including that of the state of mind, knowledge, and intentions of the speaker, as well as any significant interests—particularly in the form of free speech values and purposes—on either side of the case.

Following this concrete introduction to lying and freedom of speech, this Article will now turn to a broader sampling of some of the best-known thinking on the very nature, moral qualities, and consequences of lying in various contexts.

("Friday is my study night"); to make others feel better ("Gee you've gotten skinny"); to avoid recriminations ("I only lost \$10 at poker"); to prevent grief ("The doc says you're getting better"); to maintain domestic tranquility ("She's just a friend"); to avoid social stigma ("I just haven't met the right woman"); for career advancement ("I'm sooo lucky to have a smart boss like you"); to avoid being lonely ("I love opera"); to eliminate a rival ("He has a boyfriend"); to achieve an objective ("But I love you *so* much"); to defeat an objective ("I'm allergic to latex"); to make an exit ("It's not you, it's me"); to delay the inevitable ("The check is in the mail"); to communicate displeasure ("There's nothing wrong"); to get someone off your back ("I'll call you about lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

United States v. Alvarez, 638 F.3d 666, 674–75 (9th Cir. 2011) (order denying rehearing en banc) (Kozinski, J., concurring). Cf. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1988) (1953) (discussing nearly twenty-six different "language games").

³⁶ See *Alvarez*, 617 F.3d at 1217–18.

³⁷ For a sense of the inescapable murkiness and controversy involved, see generally R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

³⁸ *Alvarez*, 617 F.3d at 1200.

³⁹ *Id.* For one possible, less demanding, approach, see generally the draft card burning case of *United States v. O'Brien*, 391 U.S. 367 (1968) (assuming only an incidental effect on the content of the speech).

⁴⁰ *Alvarez*, 617 F.3d at 1217. But see *id.* at 1218 (Bybee, J., dissenting) (citing, among other cases, the language from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

This sampling will help to provide perspective for the legal arguments and conclusions throughout the Article.

III. THE BEST THAT HAS BEEN THOUGHT AND SAID . . . ON THE SUBJECT OF LYING

A. Some Classic Views on Lies and Lying

For purposes of this brief historical survey, the relevant writings are approached semi-chronologically. The overall results may suggest a partial and uneven drift away from an earlier absolutist moral condemnation of lies and lying.⁴¹ But it is just as fair to say that for quite some time, and up to the present day, many varieties of more absolutist and less absolutist views about lying have co-existed.

Among the earliest reflections recorded in the Prasna Upanisad, a Sanskrit text consisting of six questions and their answers, are that persons themselves “wither” in some important sense when they lie.⁴² More positively, in Hinduism, there is the Brahman, the supreme and universal Spirit underlying all phenomena, and the image of “that stainless world of Brahman in whom there is no crookedness, no falsehood or deceit.”⁴³ And in more directly binding language, there is the fourth of the five fundamental Buddhist moral precepts: “I undertake the precept to refrain from speaking falsely.”⁴⁴ In these philosophies, a lie to an SS officer or slave hunter by someone sheltering fugitives would not be acceptable or moral, even if the lie saves lives.

⁴¹ The term “liar” is unfortunately ambiguous in a distinctive way. The term may be used to emphasize someone’s character—as in a penchant for prevarication and mendacity—in the form of a disposition over time. But the term may of course also refer to someone who had lied on only some single, specific occasion. *See, e.g.,* VI THE OXFORD ENGLISH DICTIONARY 235 (Oxford University Press 1961) (1933), under the entry “liar” (contrasting being “an untruthful person,” which seems to go to habit, disposition, or character, with “one who tells a falsehood,” which seems more focused on a single act or instance).

⁴² UPANISADS 286 (Patrick Olivelle trans., 1996) (responding to question 6).

⁴³ *Id.* at 280 (question 1); *see also* THE LAWS OF MANU 87 (Wendy Doniger & Brian K. Smith trans., 1991) (“A man should tell the truth and speak with kindness; he should not tell the truth unkindly nor utter lies out of kindness. This is a constant duty.”). It is unclear whether fugitive slave or Holocaust sheltering cases can be contained within the scope of the idea of “kindness.”

⁴⁴ DAMIEN KEOWN, *BUDDHIST ETHICS: A VERY SHORT INTRODUCTION* 9 (2005). Presumably this precept is not intended to (equally) bar all innocent and conscientious but ultimately false assertions on matters of fact. *See* MARCUS AURELIUS, *MEDITATIONS* 71 (Maxwell Staniforth trans., 1964) (stating “[t]o what, then, must we aspire? This, and this alone: the just thought, the unselfish act, and the tongue that utters no falsehood,” but failing to address possible severe conflicts internal to this question).

In the Western tradition, Plato's characterization of Socrates advocates, in describing the ideal polis, what is often translated as a "noble lie"⁴⁵ regarding the relationships among citizens. The "noble lie," however, is plainly intended as a sort of parable or allegory conveying a deep truth.⁴⁶ For our purposes, it is misleading to think of this concept as interchangeable with lying.

One of the earliest and most interesting sustained treatments of lying is that of St. Augustine, an absolutist.⁴⁷ Augustine offers both analytical and normative points, and even posits the case—akin to our contemporary "Stolen Valor" cases⁴⁸—of someone who claims, "that he has served with the army . . . in Persia, though he never set foot out of Rome."⁴⁹

Augustine's absolutist stand against lying ultimately relies on his well-known theological premises. Summarily, "[s]ince . . . by lying eternal life is lost, never for any man's temporal life must a lie be told."⁵⁰ Augustine thus extends the prohibition of lying to cover even cases of lying aimed at the spiritual, and not merely the temporal good of another person.⁵¹ On these controversial theological assumptions, we might wonder whether a lie told to a young SS officer near the close of World War II might—lovingly—help save the officer's immortal soul.

Augustine's absolutism certainly does not go untested. He recognizes that there are limits to our ability to spontaneously devise not lies, but clever and effective deceptions to protect innocent persons—whose hiding place we know—from would-be murderers,⁵² as in the SS cases.⁵³ Yet Augustine must counsel betrayal, if necessary, rather than lying in such a case, again on theological grounds.⁵⁴ As one contemporary examination of Augustine's approach has it, "[l]ies, for Augustine, are . . . deliberately duplicitous verbal claims—no matter what their effects. . . . Some lies will have good effects; others will have bad ones.

⁴⁵ THE REPUBLIC OF PLATO 106 n.1 (Oxford Univ. Press ed. 1990) (Francis MacDonald Cornford trans., 1945).

⁴⁶ *Id.*

⁴⁷ See AUGUSTINE, ON LYING [DE MENDACIO] (Kevin Knight ed.) (H. Browne trans., 1887) (395), available at www.newadvent.org/fathers/1312.htm (last visited July 26, 2011), Augustine's Retractions, book I, last chapter.

⁴⁸ See *supra* Part II.

⁴⁹ AUGUSTINE, *supra* note 47, ¶ 18.

⁵⁰ *Id.* ¶ 9.

⁵¹ See *id.* ¶ 11.

⁵² See *id.* ¶¶ 12–14, 22–25.

⁵³ See *infra* Part IV.B.

⁵⁴ See AUGUSTINE, *supra* note 47, ¶ 42 ("[T]hose testimonies of Scripture have none other meaning than that we must never at all tell a lie . . . [U]nto eternal salvation none is to be led by aid of a lie."). For a more skeptical view, see LA ROCHEFOUCAULD, MAXIMS 45 (Leonard Tancock trans., Penguin ed. 1982) (1665) (maxim number 63) ("Aversion from lying is often a hidden desire to give weight to our own statements and invest our words with religious authority.").

None of this is relevant . . . to considering whether the lie is ever appropriate or defensible.”⁵⁵

It is hard to imagine that a free speech analysis would change Augustine’s mind on the morality, regardless of the legality at civil or criminal law, of some instances of lying. Even Augustine seems to concede that, on some occasions, failing to lie can have plainly bad consequences and that lying may be the only way to obtain plainly good consequences obtainable in no other way.⁵⁶ Whether some of these good consequences can take the form of the basic values underlying freedom of speech is another question,⁵⁷ as is the real moral or constitutional weight of such consequences. But Augustine has, quite realistically, made some important concessions to our ultimate case.⁵⁸

Thomas Aquinas, reflecting Augustine’s influence, seems to retain Augustine’s absolutism, while elaborating on his main concession. Aquinas holds in particular that

the sin of lying is aggravated, if by lying a person intends to injure another, . . . while the sin of lying is diminished if it be directed to some good—either of pleasure . . . or of usefulness, . . . whereby it is intended to help another person, or to save him from being injured. . . . Now it is evident that the greater the good *intended*, the more is the sin of lying diminished in gravity.⁵⁹

To Aquinas, no less than to Augustine, the question is about someone who has explicitly or implicitly promised sanctuary to a family of fugitive slaves, or to a family hunted by the SS. The person who made the promise now faces an unavoidable choice between the death of her own family and those relying on her for safety (along with any effects on the presumably immortal souls of the hunters) on the one hand. And on the other hand the sincerely *intended* outcome of the safety of those she has promised sanctuary, along with the intended salvation of the immortal souls of the hunters who were prevented from committing murder.⁶⁰ The

⁵⁵ PAUL J. GRIFFITHS, *LYING: AN AUGUSTINIAN THEORY OF DUPLICITY* 38 (2004) (Augustine recognizing that some lies “harm no one and provide some benefit”). Note also the possible moral ambiguities of some lying in negotiation and bargaining contexts. See, e.g., Gerald Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219 (1990); Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529 (1998).

⁵⁶ See *supra* notes 49–55 and accompanying text.

⁵⁷ See *infra* Part V.

⁵⁸ See *infra* Part VI.

⁵⁹ ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I–II, qu. 110, art. 2, respondio, at 1659 (Benziger Bros. ed. 1948) (Fathers of the English Dominican Province trans. 1920) (emphasis added).

⁶⁰ Imagine again that the hunters are young and inexperienced, though perhaps at serious risk of impending death themselves as the Second World War concludes.

latter outcomes may realistically be obtained only through a lie, as distinct from silence or any other clever verbal maneuverings short of lying.⁶¹

Even in such circumstances, Augustine and Aquinas may wish to reject the option of lying on moral or theological grounds. Yet it is hardly unreasonable to take an accounting of the substantial benefits—personal, social, and constitutionally cognizable—of a lie told in a profoundly loving spirit and with a universally loving intention.

Essayist Michel de Montaigne exhibits a similar uncompromising and absolutist spirit, expressed in more secular terms.⁶² Montaigne argues, “lying is an accursed vice. We are men, and hold together, only by our word. If we recognized the horror and gravity of lying, we would persecute it with fire more justly than other crimes.”⁶³ Montaigne here certainly makes a legitimate point, though perhaps not strongly enough to justify his recommended criminal sanction. Language, and the reliability of language, is not just a matter of coordination, efficiencies, or avoiding unnecessary costs. Realistically, humans depend on faithfulness in utterance even for survival and for the survival of civilization itself.

Montaigne’s own analysis can, however, be stood on its head in the extreme circumstances posed by our fugitive slave hunt cases, or the cases of those who sought to protect Jews throughout the Shoah. Under the stress and unanticipated demands of the moment, a person may well lack the wit to instantly devise a clever response that is intentionally and grossly misleading, yet not quite a lie, that successfully throws a suspicious fugitive slave-hunter, Nazi functionary, or just an extortionist neighbor, off the trail.

Montaigne must then be confronted, with his own goals and valuations in just such cases. Could it not be equally reasonable to argue that it is the speech of the sanctuary-giver—whether intentionally deceptive or an outright lie—that best upholds and defends the basic values of solidarity, community, mutual consideration, and respect prized by Montaigne?⁶⁴ And does not the promotion of these basic values approach some of the underlying logic and value of protecting freedom of speech?⁶⁵

Not all insightful writers on the subject of lying, however, have approached the subject as absolute prohibitionists and without a sense of our inescapable human weaknesses and limitations. Jonathan Swift, for example, dryly observes

⁶¹ We may also assume that a successful lie allows the sanctuary-giver to continue her indispensable non-lying work of rescuing other persons from re-enslavement or violent, horrific death, whereas anything short of a (skillful) lie ensures just such an immediate death for the would-be protector herself, and perhaps her own entire family, leaving others in desperate need of her assistance with no alternative.

⁶² Michel de Montaigne, *Of Liars*, in *THE COMPLETE ESSAYS OF MONTAIGNE* 21, 23 (Donald M. Frame trans., 1976) (1572–1574).

⁶³ *Id.*

⁶⁴ See *id.* Do we really want to say that both the Nazi functionary and the sanctuary-giver, whose lie is at least intended to send him away, undermine human solidarity and community, just in different ways?

⁶⁵ See *infra* Part V.

that "but though the Devil be the father of lies, he seems, like other great inventors, to have lost much of his reputation by the continual improvements that have been made upon him."⁶⁶ Much later, Mark Twain remarks on the universality of lying, contrary to the spirit of Augustine:⁶⁷

The man who speaks an injurious truth, lest his soul be not saved . . . , should reflect that that sort of a soul is not strictly worth saving. The man who tells a lie to help a poor devil out of trouble is one of whom the angels doubtless say, "Lo, here is an heroic soul who casts his own welfare into jeopardy to succor his neighbor's; let us exalt this magnanimous liar."⁶⁸

Memorable satire, such as Twain's, rarely endures where it is entirely without insight and justification.⁶⁹

Before considering the philosopher Immanuel Kant's work on the subject of lying,⁷⁰ the views of his successors in the nineteenth century should be addressed. They were, in fact, as divided on the subject of lying as Kant's predecessors. John Henry Newman, for example, gravitates toward a generally absolutist moral prohibition of lying, albeit with some rare exceptions. Newman considers, for example, the following circumstances:

As to Johnson's case of a murderer asking you which way a man had gone, I should have anticipated that . . . his first act would have been to knock the man down, and to call out for the police; and next, if he was worsted in the conflict, he would not have given the ruffian the information he asked, at whatever risk to himself. I think he would have let himself be killed first. I do not think that he would have told a lie.⁷¹

Assuming Newman is speaking of general ethics here, and not just assessing some particular character, the question would be whether choosing one's own death before lying would also be the morally, though hardly legally, required course if the ruffian were instead intent upon stealing the anonymous victim's wallet. Is death before lying also morally required in order to prevent a pickpocketing?

⁶⁶ Jonathan Swift, *The Art of Political Lying*, in *THE PORTABLE SWIFT* 156, 156 (Carl Van Doren ed., 1986). See also the work of Swift's friend, DR. JOHN ARBUTHNOT AND JONATHAN SWIFT (K. Tompkins ed., 1874).

⁶⁷ See *supra* note 51 and accompanying text.

⁶⁸ Mark Twain, *On the Decay of the Art of Lying*, in *THE COMPLETE HUMOROUS SKETCHES AND TALES OF MARK TWAIN* 503 (Charles Neider ed., 1985).

⁶⁹ Cf. Oscar Wilde, *The Decay of Lying*, in *THE DECAY OF LYING AND OTHER ESSAYS* 20 (2003) ("He [the liar] is the very basis of civilized society.").

⁷⁰ See *infra* Part III.B.

⁷¹ JOHN HENRY CARDINAL NEWMAN, *APOLOGIA PRO VITA SUA* 329 (A. Dwight Culler ed., 1956) (1864).

Of course, given any hypothetical circumstance, one can always imagine intervening events, however unlikely, that reduce the moral and other costs of not lying.⁷² For example, consider if the ruffian will also murder or re-enslave persons who have placed their trust in the individual accosted by the ruffian, and that silence, overpowering the ruffian(s), or summoning the police will save no one (the ruffians may be the police).⁷³

Newman's contemporary, John Stuart Mill, took a different view of the matter, going so far as to suggest a moral duty to break the law in extraordinary circumstances, such as to prevent the death of an innocent person.⁷⁴ Several decades later, the philosopher Henry Sidgwick noted the "Common Sense"⁷⁵ attractiveness of lies in particular circumstances.⁷⁶ Sidgwick's response was that

if the lawfulness of benevolent deception in any case be admitted, I do not see how we can decide when and how far it is admissible, except by . . . weighing the gain of any particular deception against the imperilment of mutual confidence involved in all violation of truth.⁷⁷

The important costs and benefits of such lies should be considered. As an example on the cost side, the individual actor or the broader society must consider not only the incremental erosion of mutual confidence,⁷⁸ but also the moral costs of any friendships betrayed by lying.⁷⁹ As well as the all-too-human⁸⁰ tendency for the individual actor or broader society to falsely and self-servingly imagine that our own circumstances conveniently fit within some exception to a rule.

The obvious and quite substantial moral benefits of "benevolent" lies should also be taken into account. Among these benefits may be some of the basic values that underlie freedom of speech in general.⁸¹ These considerations are expanded upon next in the context of the work of Immanuel Kant.

⁷² Again, we merely assume here, along with most absolutists, a potentially morally relevant difference between lying and various kinds of deception and intentionally misleading speech held not to amount to a lie. See *infra* Part III.C.

⁷³ See *infra* Part IV.A–B.

⁷⁴ See John Stuart Mill, *Utilitarianism*, in *ON LIBERTY AND OTHER ESSAYS* 131, 200 (John Gray ed., 1991).

⁷⁵ HENRY SIDGWICK, *THE METHODS OF ETHICS* 316 (Hackett Pub. Co. 1981) (1874).

⁷⁶ See *id.*

⁷⁷ *Id.*

⁷⁸ See *supra* note 63 and accompanying text.

⁷⁹ In the cases of primary concern to us, the moral cost of betraying the trust of slave-hunters or SS officials will typically be near zero if not, in fact, less than zero.

⁸⁰ For Nietzsche's distinctive take on lying, see FREDRICH NIETZSCHE, *ON TRUTH AND LIES IN A NONMORAL SENSE* (1873), available at www.e-scoala.ro/biblioteca/friedrich_nietzsche.html (last visited June 26, 2011).

⁸¹ See *infra* Part V.

B. *The Lessons of Immanuel Kant on Lying*

The modern philosopher most popularly associated with an absolutist moral condemnation of lying is Immanuel Kant. Kant famously argues that a maxim, or underlying descriptive principle, that allows lying whenever a lie is advantageous could not be universalized. This would sabotage the credibility of assertions and thus the meaningfulness and appeal of the cultural institution of making and paying attention to verbal assertions.⁸² Kant thus concludes that a household servant would violate a duty to himself if, on the orders of the householder, the servant were to lie to someone at the door about the presence of the householder.⁸³

Could Kant's assessment change if the stranger at the door were clearly intent upon re-enslaving or murdering someone under the protection of the householder? Kant, to his credit, does not seek to draw some murky *ad hoc* distinction between an inquirer who has a right to be told the truth, and one who does not.⁸⁴ If a suspicious stranger is at the door, we may well think of responsibilities, consequences, or of rights generally—but thinking in terms of whether the person standing before us does or does not have a “right to the truth” is likely to either beg the question, or to merely restate the relevant moral considerations.

But could it not be argued, in Kantian terms, that even lying to a slave-hunter or an SS officer at the door fails to respect their rationality or personhood?⁸⁵ At least to some degree, it could. But that concession also opens a number of other possibilities. Could not a lie to a murderous SS officer also promote the rationality, personhood, or dignity of that SS officer over the longer term? Is the SS officer himself acting, in that instance or in general, on any universal Kantian maxim? And is it not clear that a lie to the SS officer could promote the rationality and personhood of the person answering the door, the householder, the householder's own family, and anyone given sanctuary by the householder? Rational flourishing and self-determination, meaningful freedom in choosing, and certainly the minimal prerequisites to making such choices, including life itself, are crucially on the line for all these people. And may be uniquely and directly promoted by a lie.

Ordinary experience shows us that people do in fact lie, with a variety of motives, just as they breach legally binding contracts with some frequency,

⁸² See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 89–90 (H.J. Paton ed. & trans., Harper & Row Pub. Co. 1964) (1785) (on what it means to “promise” in particular); IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, 182–83 (Mary Gregor ed. & trans., 1996) (1797) (“[C]ommunication . . . that yet (intentionally) contain[s] the contrary of what the speaker thinks on the subject is an end that is directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts.”).

⁸³ See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 82, at 184.

⁸⁴ See Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, in IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 425–30 (James W. Ellington ed., 3d ed. 1993).

⁸⁵ For a discussion, see Alexander R. Pruss, *Lying, Deception and Kant* (Aug. 30, 2001) (unpublished manuscript), available at www9.georgetown.edu/faculty/ap85/papers/LyingAndDeception.html (last visited June 26, 2011).

sometimes for a benefit.⁸⁶ Reasonably frequent instances of lying have not, thus far, plainly sabotaged the system of human communication through verbal assertion. And it has never been obvious why we should focus, as Kant would have it, on the alleged impossibility or the self-defeating goal of willing that everyone lie in some, if not all, circumstances.

Nor does Kant himself seem insensitive to the consequences of absolutism in this regard. At one point, Kant startlingly narrowed his definition of a lie: “[n]ot every untruth is a lie; it is so only if there is an express declaration of my willingness to inform the other of my thought.”⁸⁷ Perhaps Kant was responding to the possibility of the villainous exploitation of a victim’s refusal to lie. Kant realistically acknowledges that “if, in all cases, we were to remain faithful to every detail of the truth, we might often expose ourselves to the wickedness of others, who wanted to abuse our truthfulness.”⁸⁸

Worse, though, is that a refusal to lie—and not just regarding matters of detail⁸⁹—might simultaneously expose oneself, one’s family, those relying on one’s sanctuary, and conceivably even the interrogating officer himself to the gravest physical or (if we include such considerations) spiritual harm. Stated in positive terms, the beneficial consequences of such a lie could well encompass a number of crucial free speech values.⁹⁰ Kant’s focus on basic values, such as autonomy, has of course been influential, but his application of such basic values to lying seems mishandled.⁹¹

⁸⁶ See, e.g., Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977).

⁸⁷ IMMANUEL KANT, LECTURES ON ETHICS 203 (Peter Heath et al. eds. & trans., Cambridge Univ. Press 1997) (1784–1785). Such situations might include, for example, the voluntary taking of an oath.

⁸⁸ *Id.* at 204.

⁸⁹ See *id.*

⁹⁰ See *infra* Part V.

⁹¹ For a sampling of contemporary discussions of Kant on lying, see, for example, THOMAS E. HILL, JR., AUTONOMY AND SELF-RESPECT 40 (1991) (generally sympathetic to Kant’s account, but granting that “[s]ometimes we need to lie to increase the chances that a person will make his own decisions (and so live autonomously)”; CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 17 (1996) (recognizing that deceiving others may undermine their freedom of choice, humanity, or status as an end—but not sufficiently accounting for the freedom of choice of other directly affected parties, or for the possibility that lying to a person may actually treat that person as an end, as one who is infinitely worthy and who has a duty to respect the minimal human rights of innocents); ONORA O’NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT’S PRACTICAL PHILOSOPHY 45 (1989) (referring to Kant’s “unsatisfactory resolution of dilemmas posed by would-be murderers who ask for vital information”); ALLEN W. WOOD, KANT’S ETHICAL THOUGHT 414 n.16 (1999) (sympathetically expounding Kant’s position, while conceding that on some occasions, lying might maximize self-perfection (or presumably that of other persons)); David Sussman, *On the Supposed Duty of Truthfulness: Kant on Lying in Self-Defense*, in THE PHILOSOPHY OF DECEPTION 225 (Clancy Martin ed., 2009);

C. Some Contemporary Analyses of Lying

Contemporary philosophers have provided many careful discussions of the concept and morality of lying. Among the most useful for our purposes is that of Professor Joseph Kupfer.⁹² Professor Kupfer argues that in particular contexts, some lies “are excusable and others justifiable.”⁹³ Nevertheless, there is a presumption against lying:

The first inherent disvalue is the immediate restriction of the deceived’s freedom. This . . . inclines the liar in the direction of disrespect for people. The second inherent disvalue found in lying is the self-opposition or internal conflict involved in speaking what one disbelieves. This, in turn, contingently threatens the integration of the liar’s personality.⁹⁴

Professor Kupfer qualifies this picture by noting that a lie may be intended to preserve and protect the legitimate freedom of the liar or another person—presumably many others.⁹⁵ In addition, autonomy or self-determination of other persons, as well as certain basic democratic governance and equality values, might constitute or directly support basic free speech values.⁹⁶

Kupfer also recognizes that a lie may enhance the freedom of the person lied to, in the long run.⁹⁷ But even Kupfer’s own basic thesis statements may not hold for all cases of lying. For instance, consider whether a lie to a fugitive slave-hunter or to an SS officer searching for Jews must immediately restrict the questioner’s freedom. Whether he is suspicious of the veracity of the response or not, the slave hunter is presumably still free to continue to pursue his targeted victim if he so chooses. The SS officer remains as free as before to conduct as thorough or cursory a search as he wishes, as often as he cares to. It is difficult to see how a lying response has genuinely limited the questioner’s freedom in either case.⁹⁸

James Edwin Mahon, *The Truth About Kant on Lies*, in *THE PHILOSOPHY OF DECEPTION* 201 (Clancy Martin ed., 2009); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 *PHIL. & PUB. AFF.* 325, 325–349 (1986).

⁹² See Joseph Kupfer, *The Moral Presumption Against Lying*, 36 *REV. METAPHYSICS* 103 (1982).

⁹³ *Id.* at 103.

⁹⁴ *Id.*

⁹⁵ See *id.* at 110.

⁹⁶ See *infra* Part V.

⁹⁷ Kupfer, *supra* note 92, at 108. Presumably, a parallel argument might be made about self-realization and other free speech values as well.

⁹⁸ But cf. *id.* at 103 (noting the immediate restriction of the deceived person’s freedom as an inherent negative component of all lies).

Nor is it obvious, in the examples of the fugitive slave-hunter and SS officer that the lying answer reflects disrespect⁹⁹ or denigration¹⁰⁰ for the various parties directly affected, or even for the questioner himself. The lie may be instead motivated by a sense of the equal or irreplaceable value and infinite dignity of persons, or even by a genuine concern for the questioner's moral or spiritual well-being.

Similarly, a lie to the fugitive slave-hunter or SS officer need not involve, on the part of the speaker, any arrogance,¹⁰¹ or any breach of faith or trust¹⁰² with a (suspicious) questioner, and assuredly not with those the "liar" refuses to betray. Nor need there be any treachery,¹⁰³ cowardice,¹⁰⁴ or self-indulgence¹⁰⁵ in such a lie.

Crucial to Professor Kupfer's analysis is the supposedly inherent disvalue of "self-opposition or internal conflict"¹⁰⁶ within the liar, perhaps even threatening the disintegration of the liar's personality.¹⁰⁷ But anyone providing sanctuary to innocent persons, who lies to a brutal authority figure about it, is likely to feel immense conflict and stress—given the stakes for all those affected. Surely, betraying helpless innocents in one's charge by telling the truth might well result in lesser comparative conflict, long term stress, guilt, and remorse. Persons of sound moral character might find, despite the enormous stress, that lying to the SS officer at least allowed them to retain their fundamental moral integrity.

In contrast to Professor Kupfer's analysis, Professor Alasdair MacIntyre insightfully suggests that our overall goal should be to protect truth in relationships,¹⁰⁸ and that "the justified lies told to frustrate aggressors"¹⁰⁹ may well serve that goal, like truth-telling in more ordinary circumstances. This seems entirely realistic and sensible. The protection and pursuit of the truth, it will be shown,¹¹⁰ counts as a basic value or goal underlying the protection of freedom of speech.

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 113.

¹⁰¹ *See generally id.* (describing lying as arrogant, as when one thinks too highly of oneself).

¹⁰² *See generally id.* at 115 (citation omitted) (commenting that lying is essentially a breach of faith).

¹⁰³ *See generally id.* (explaining that lying is disrespectful to the person being deceived and is thus a kind of treachery).

¹⁰⁴ *See generally id.* at 125 (commenting that lying makes one give in to fear and thus supports cowardice).

¹⁰⁵ *See generally id.* at 126 (describing self-indulgence as an auxiliary of lying).

¹⁰⁶ *Id.* at 103.

¹⁰⁷ *Id.*

¹⁰⁸ *See* ALASDAIR MACINTYRE, TRUTHFULNESS, LIES, AND MORAL PHILOSOPHERS: WHAT CAN WE LEARN FROM MILL AND KANT? 357 (Tanner Lectures on Human Values, 1994), available at www.tannerlectures.utah.edu/lectures/documents/macintyre_1994.pdf (last visited June 26, 2011).

¹⁰⁹ *Id.*

¹¹⁰ *See infra* Part V.

Professor MacIntyre's point can be applied to other basic free speech values as well. Consider, for example, human fulfillment or self-realization.¹¹¹ Some natural law theorists¹¹² counted Augustine¹¹³ and Aquinas¹¹⁴ as influences, causing their view to lean toward absolutism. Yet they also recognized the free speech value of fulfillment—for self and for others affected by one's actions¹¹⁵—as crucial to a life well led.¹¹⁶ The examples of interrogations by fugitive slave-hunters or SS officers will show that a lie has the potential, under such circumstances, to promote overall human fulfillment distinctly better than telling the truth.¹¹⁷ Indeed, it is difficult to see the betrayal of the escaping slaves or the Jews as anything less than a betrayal of the most basic human values,¹¹⁸ including free speech values.¹¹⁹ The next section of this Article considers some actual historical cases that will help focus the examination of the morality of lying.

¹¹¹ See *infra* Part V.

¹¹² See, e.g., JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 11 (1991); Gary Chartier, *Toward a Consistent Natural-Law Ethics of False Assertion*, 51 AM. J. JURIS. 43, 44 (2006); Mark C. Murphy, *Natural Law and the Moral Absolute Against Lying*, 41 AM. J. JURIS. 81, 82 (1996); Christopher Tollefsen, *Lying: The Integrity Approach*, 52 AM. J. JURIS. 273, 273 (2007).

¹¹³ See *supra* notes 47–58 and accompanying text.

¹¹⁴ See *supra* notes 59–61 and accompanying text; see also THOMAS AQUINAS, *ON EVIL* (Brian Davies ed., Richard Regan trans., Oxford Univ. Press 2003) (1269–1272).

¹¹⁵ See, e.g., Chartier, *supra* note 112, at 43.

¹¹⁶ See *id.*

¹¹⁷ See *infra* Parts IV.A–B.

¹¹⁸ A complication might be raised by the case of a potential sanctuary-offerer who gives clear, if quite unexpected, advance warning that under no circumstances will he lie to a murderous SS officer, at least where there is possibly time for the pursued Jews to make alternative arrangements for their safety. To actually betray those unsuspecting persons to whom one has afforded sanctuary will strike many of us as neither admirable nor principled, or as respectful of the rationality of the SS officer, but as manifesting an astonishing incapacity for empathy, solidarity, civilization, and responsibility. *But see* Tollefsen, *supra* note 112, at 281–82 (discussing the work of Germain G. Grisez, who acknowledges the Nazi as part of the human community while also acknowledging the Nazi's violation of the human community); Germain G. Grisez, *The Way of the Lord Jesus*, 2 LIVING A CHRISTIAN LIFE 405, 407 (1993).

¹¹⁹ The insightful contemporary literature on the subject of lying is substantial. For further examples, with an emphasis on philosophical literature, see SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 84 (2d ed. 1999) (discussing the claim that some lies can actually promote the values of truth and veracity); THOMAS L. CARSON, *LYING AND DECEPTION: THEORY AND PRACTICE* 30 (2010) (describing Carson's definition of 'lying' as requiring an asserted falsehood and some vague subjective sense of falsity, but not an intent to effectively deceive); *id.* at 85–86 (citing an instance of lying to save twelve Jews during the Shoah); MARTIN JAY, *THE VIRTUES OF MENDACITY: ON LYING IN POLITICS* 67 (2010) (explaining that the would-be murderer threatening the innocent is not deserving of the truth); SHELLEY KAGAN, *NORMATIVE ETHICS* 108 (1998) (describing lying as typically denying someone the information they need “to accomplish whatever it is they wanted to accomplish”—which presumably could have involved moral abomination on any

IV. LYING AND POSITIVE MORAL VALUE

A. *Some Fugitive Slave and Slave-Hunter Cases*

There is a historical context relevant to American slavery, fugitive slave-hunting, and associated instances of lying. In Chief Justice Taney's recounting in *Dred Scott*,¹²⁰ before and during the time of the Constitution's drafting, even non-slave or emancipated African-Americans did not generally count as equal persons, or as Americans. They had, in Taney's words:

been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an

scale, or the denial of some of the basic free speech values); Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 444 (1997); Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 670 (2010) (arguing that "true scientific speech and false scientific speech should each become a stand-alone First Amendment speech category"); Arnold Isenbergh, *Deontology and the Ethics of Lying*, 24 PHIL. & PHENOMENOLOGICAL RES. 463, 466 (1964) ("A lie is a statement made by one who does not believe it with the intention that someone else shall be lead to believe it."); James Edwin Mahon, *The Definition of Lying and Deception*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 21, 2008), <http://www.plato.stanford.edu/entries/lying-definition/>; Frederick A. Siegler, *Lying*, 3 AM. PHIL. Q. 128, 128 (1966); David Simpson, *Lying, Liars and Language*, 52 PHIL. & PHENOMENOLOGICAL RES. 623, 623–24 (1992); Robert C. Solomon, *Self, Deception, and Self-Deception in Philosophy*, in THE PHILOSOPHY OF DECEPTION 15, 17 (Clancy Martin ed. 2009) (responding to the basic argument that dishonesty "deforms the liar and debases the currency of language" by saying: "Lies can protect and inspire, and deception can serve noble ends"); Roy Sorensen, *Knowledge-Lies*, 70 ANALYSIS 608, 608–09 (2010) (discussing the mass-lying of the slaves claiming to be Spartacus, and comparing the act of non-Jewish Danes wearing yellow badges to make Nazi identification of Jews more costly); Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PAC. PHIL. Q. 251, 252 (2007); Alan Strudler, *The Distinctive Wrong in Lying*, 13 ETHICAL THEORY & MORAL PRAC. 171, 171–73 (2010) (asserting that lying is commonly wrong in aiming "to breach a trust"); see also David Nyberg, *Noble Lies, Narrative Truths, and the Art of Voice: Thoughts on Pragmatic Language and the First Amendment*, 64 U. CIN. L. REV. 1203, 1205, 1210 (1996) (noting the apparent truth-telling absolutism of RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 214 (1996), but arguing that apparent lies in some cases of "extreme danger" qualify not as morally justified lies, but simply not as lies at all). For discussion of the related problem of public official sincerity, see Mathilde Cohen, *Sincerity and Reason Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010).

¹²⁰ *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 404–08 (1857).

ordinary article of merchandise and traffic, whenever a profit could be made by it.¹²¹

Of course, this dehumanization, and literal commodification, was not universally endorsed by the broader society.¹²² For our purposes, the inherent contradiction of slavery can be seen in the willingness of the slave-owner to think of the enslaved person as both a mere article of merchandise¹²³ and as someone who can be accused of an intentional act of lying. A commodity can at worst be thought of as “defective.” A commodity cannot, logically, be “accused” of anything, let alone of some complex intentional act like lying.¹²⁴

The historical debate over commodity status versus personhood status demonstrates the enormous stakes at issue. For enslaved, previously enslaved, or free blacks—indeed for all persons—the free speech values of self-realization and of genuine political democracy, among others,¹²⁵ were crucially at stake. The gravity was noted in the well-known *Schooner Amistad* case,¹²⁶ in which Justice Story stated a key legal issue in the following terms: “[i]f these negroes were . . . lawfully held as slaves under the laws of Spain, and recognized by those laws as property capable of being lawfully bought and sold; we see no reason why they may not justly . . . be included under the denomination of merchandise.”¹²⁷ In the domestic fugitive slave context, the Supreme Court also separately considered an indictment of “Willis Lago, free man of color.”¹²⁸ Per the indictment, Lago “did . . . entice Charlotte, a slave, . . . to leave her owner and possessor, and did aid and assist said slave in an attempt to make her escape from said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky.”¹²⁹ One is tempted to reply that no attempt to escape enslavement could possibly have been contrary to the dignity of the Commonwealth of Kentucky. But the narrower focus here is on lying in the course of an escape from slavery.

¹²¹ *Id.* at 407.

¹²² See, e.g., *id.* at 550 (McLean, J., dissenting) (Even someone reduced to slavery “is not a mere chattel. He bears the impress of his Maker” and possesses an immortal soul.). For further general discussion, see, for example, Mark Graber, “No Better Than They Deserve”: *Dred Scott* and Constitutional Democracy, 34 N. KY. L. REV. 589 (2007).

¹²³ See *supra* text accompanying note 121.

¹²⁴ For some of the prerequisites of lying, and of the capacity to lie, see *supra* note 119.

¹²⁵ See *infra* Part V.

¹²⁶ *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. (1 Pet.) 518 (1841) (In this case, the case caption itself went on to refer to the ship’s tackle, apparel and furniture, cargo, and a number of Africans—in that order.).

¹²⁷ *Id.* at 593 (Justice Story rejecting the supposition in question).

¹²⁸ *In re Commonwealth of Kentucky v. Dennison*, 65 U.S. (1 Black) 66, 68 (1861), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 224 (1987).

¹²⁹ *Id.* (citations omitted); see also, e.g., *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 539 (1842), as discussed in Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 279–80 (2000); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 50 (2007).

The noted Abolitionist and former slave Frederick Douglass had, by his own admission, resorted to forgery¹³⁰ and to oral lying¹³¹ when necessary to effectuate or protect an escape from slavery. Such circumstances were not unusual. Harriet Tubman, as well, utilized forged documents¹³² and engaged in tactical “disinformation” to avoid possible betrayals.¹³³

It is not as though fugitive slaves or those assisting them thought lightly of lying as a moral issue. Consider, for example, after not having seen her father for five years, Harriet Tubman arranged a family meeting but insisted her father remain blindfolded the entire time.¹³⁴ The blindfolding would allow Tubman’s father to truthfully deny, as he did under later interrogation,¹³⁵ that he had seen any escaped members of his family within five years.¹³⁶

Abolitionists, however, were plainly aware of the moral stakes in what we would today call issues of “transparency.” Consider, for example, the general conclusion reached by Frederick Douglass:

I would keep the merciless slaveholder profoundly ignorant of the means of flight adopted by the slave. . . . Let him be left to feel his way in the dark; let darkness commensurate with his crime hover over him. . . . Let us render the tyrant no aid; let us not hold the light by which he can trace the footprints of our flying brother.¹³⁷

At least at this broad level of generality, as well as in specific circumstances,¹³⁸ Douglass recognizes the complex moral status of various forms of deception, when otherwise unavoidable.

Throughout the historical annals of the Underground Railroad more generally, people commonly had to resort to various forms of deception—from clever evasions and misrepresentations to overt lying, including the use of shipping crates,¹³⁹ deceptive intimidation,¹⁴⁰ elaborate acting and identity misstatement,¹⁴¹

¹³⁰ See FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE 78 (Oxford ed. 1999) (1845) (discussing his forged travel authorizations).

¹³¹ See *id.* at 81 (“We all denied that we ever intended to run away.”).

¹³² CATHERINE CLINTON, HARRIET TUBMAN: THE ROAD TO FREEDOM 94 (2004).

¹³³ See *id.* at 89.

¹³⁴ See *id.* at 96.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See DOUGLASS, *supra* note 130, at 89.

¹³⁸ See *supra* text accompanying notes 130–131.

¹³⁹ See WILLIAM STILL, THE UNDERGROUND RAILROAD: AUTHENTIC NARRATIVES AND FIRST-HAND ACCOUNTS 24–25 (Ian Frederick Finseth abr. ed. 2007) (1872) (recounting the interstate shipping of William Peel in 1859).

¹⁴⁰ See *id.* at 100–01 (describing bold seizure of the initiative from slave-hunting officials).

¹⁴¹ See *id.* at 108–09.

artful deception,¹⁴² and disguises, some involving the use of opposite-gender clothing.¹⁴³ The precise forms of deception in the cause of freedom can be as varied as the opportunities and constraints posed by varying circumstances, and generated by the highly motivated, if not sometimes desperate, human imagination. In the fugitive slave context, examples of lying could be multiplied indefinitely.

One further case, fictional but evocative, comes from the pen of Mark Twain.¹⁴⁴ In a classic scene of conscience and morality from the novel *The Adventures of Huckleberry Finn*, Huck and Jim's raft is approached by armed men searching for recently escaped slaves so they can secure the attendant reward. With precocious subtlety, Huck deftly leads the slave-hunters to conclude—by offering pleas and evasions to the contrary—that “family members” aboard his raft are victims of a smallpox contagion.¹⁴⁵ The slave-hunters, gulled by Huck, ironically counsel him to lie at his next opportunity for assistance,¹⁴⁶ and with equal irony—given their mercenary aims in slave-hunting—charitably give Huck twenty gold pieces to help his “family,” who consists only of the fugitive slave Jim.¹⁴⁷

Like Tubman, Huck's lying does not pass unexamined by his own moral conscience. Huck “knows” that lying to protect his friend Jim was morally wrong.¹⁴⁸ Huck guiltily attributes his lying in this case to bad socialization,¹⁴⁹ if not to his inherent cussedness. However, in Huck's case, though the medieval scholastic distinction between a trained, fallible, and specific “conscientia”¹⁵⁰ and the reliable guidance of a broader “synderesis”¹⁵¹ would actually seem more appropriate—Jim's own reaction, quite justifiably, is far less ambivalent.¹⁵²

¹⁴² See *id.* at 123 (giving the example of vocal imitation—presentation of self—in the dark as a threatening dog in order to deter searchers).

¹⁴³ See *id.* at 123–25 (accompanied by prevarication as to identity). For a similar account of the ruses of William and Ellen Craft, from the year 1848, see James Oliver Horton & Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT L. REV. 1179–80 (1993).

¹⁴⁴ See MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 89–91 (Bantam Classic ed. 2003) (1884).

¹⁴⁵ See *id.* at 90.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 90–91.

¹⁴⁸ See *id.* at 91.

¹⁴⁹ See *id.*

¹⁵⁰ See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I–II, qu. 94, art. 1 (Kevin Knight online ed. 2008) (Fathers of the English Dominican Province trans., 1920), available at www.newadvent.org/summa.

¹⁵¹ See *id.*

¹⁵² See TWAIN, *supra* note 144, at 91.

*B. Lying to the Nazis to Save Innocent Person—
and for the Sake of Other Basic Values*

When it happens to suit its purposes, no entity can be more hostile to hearing lies than a totalitarian government.¹⁵³ Certainly, the SS's antipathy to being lied to in the course of detecting, tracking down, imprisoning, and murdering innocent Jews, and others, is well established.¹⁵⁴

On rare occasions, extraordinary quick-wittedness, under immense stress, allowed a person giving sanctuary to Jews to respond to the SS in an intentionally misleading way, but without technically lying. This rather subtle distinction is often celebrated. The philosopher Peter Geach, for example, reports that

[a] Dutch woman whom the Nazis suspected of hiding Jews told the officer who questioned her that there were Jews under the table: there were in fact Jews under the table—under the floorboards. The Nazi official took her remark as a mere piece of cheek and enquired no further.¹⁵⁵

This woman may be congratulated for her extraordinary quick-wittedness, well beyond the capacities of most people under these horrific circumstances. We may even speculate that those persons habitually unwilling to lie may have a more highly developed capacity for non-lying deceptiveness.¹⁵⁶ However, our admiration for her moral fastidiousness may be tempered if the focus is on the utter dependency of the hidden Jews on her voluntarily extended protective sanctuary, and the risks of harm to them and to her own family.

The woman in question took an unnecessary chance in skirting the boundary of lying. It might not have been clear how an already suspicious Nazi interrogator would have taken such an oddly flippant response. What if he had already suspected that Jews were being hidden, perhaps even under the floorboards, somewhere in the house? Or if he had detected an unexpected edge of nervousness mixed with the woman's insouciance? What if he had decided that such impertinence deserved the reward of ripped-out floorboards? Of course, there was no guarantee that the outright lie to the Nazis would have accomplished its aim of protection. Fortunately, here, the woman's adroit verbal gamesmanship actually

¹⁵³ See, for example, O'Brien's injunction to the hapless Winston Smith: "If you tell me any lies, or attempt to prevaricate in any way, or even fall below your usual level of intelligence, you will cry out with pain, instantly. Do you understand that?" GEORGE ORWELL, 1984, 202 (1983 ed.).

¹⁵⁴ See, e.g., *infra* sources cited throughout Part IV.B. THE OXFORD ENGLISH DICTIONARY 235 (Oxford Univ. Press 1961) (1933).

¹⁵⁵ PETER GEACH, TRUTH AND HOPE 53 (2001).

¹⁵⁶ As suggested by Geach. *Id.* at 57.

managed to preserve and promote all of the crucial moral values at stake.¹⁵⁷ Still, there does seem to be an obligation to avoid unnecessary risk of betrayal and harm to those helplessly in one's benevolence, and to one's own family. At the very least, a timely, advanced stipulation to all those concerned that one will not lie—even to save innocent lives—seems minimally appropriate.

Suppose, as well, that the SS is aware that the person being questioned will not lie. Then, the questioning SS officer could ask the "suspect" a series of similar or related questions, relying on that person's inability to concoct a series of deceptions that neither raise suspicion nor amount to outright lies. If it has been "publicized" that a particular morally transparent person will not lie, the SS officer could be especially alert for a slightly quirky, oddly phrased, or idiosyncratic answer, paying special attention to what is literally conveyed or withheld.

A public reputation for refusing to lie might thus invite exploitation. When pressed, such a respondent would likely adhere to principle and betray those dependent upon her protection, invite suspicion through silence or unresponsiveness, or ultimately collapse for practical purposes the distinction between lying and not lying. One could, in the extreme case, even say, "there are no Jews here." Nearly all language, after all, is to some degree ambiguous.¹⁵⁸ Neither "Jew" nor "here" are self-defining. The speaker could, within limits, choose her own intended meaning. But it becomes unclear why any such linguistic deviousness is qualitatively better than some sort of lie.

It is time to reflect on the basic values, attributable to freedom of speech or not, at stake in lying to the Nazis—with particular attention to those values that might actually be promoted by lying. Although both the fugitive slave cases and the Shoah cases obviously posed exceptional moral dilemmas, such instances may, in some respects, provide exceptional illumination as well. Other less extreme cases will also implicate the basic free speech values, perhaps to a diminished degree.

Certainly, those who sought to rescue or protect Jews otherwise destined for extermination found that they often had to adapt to unusual moral and psychological circumstances. As one scholar has written, "[t]hey needed to learn now to be cunning and clever, how to lie and deceive."¹⁵⁹ This does not mean that everyone lied to the Nazis when trapped in horrific circumstances.¹⁶⁰ But

¹⁵⁷ For the sake of the argument, we shall simply assume that an intentionally deceptive statement does no more violence to truth, or to trust, or to open communication as a stable system, than any form of lying.

¹⁵⁸ See, e.g., David R. Dow, *The Confused State of the Parol Evidence Rule in Texas*, 35 S. TEX. L. REV. 457, 459 (1994).

¹⁵⁹ DAVID P. GUSHEE, *RIGHTEOUS GENTILES OF THE HOLOCAUST: GENOCIDE AND MORAL OBLIGATION* 112 (Paragon House 2003) (1994); see also EVA FOGELMAN, *COURAGE AND CONSCIENCE: RESCUERS OF JEWS DURING THE HOLOCAUST* 68, 80, 81 (1994).

¹⁶⁰ Viktor Frankl reports that in Auschwitz, "I generally answered all kinds of questions truthfully. But I was silent about anything that was not expressly asked for." VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 54 (Ilse Lach trans., Beacon Press

frequently enough, under such circumstances, lying took on something of a morally imperative character.

Some such lies were fundamental. The prolific rescuer Irena Sendler writes that

“[s]ome Jewish mothers would spend months preparing their children for the Aryan side [outside the Warsaw Ghetto]. They changed their identities. They would say: ‘You’re not Icek, but Jacek. You’re not Rachela, but Roma. And I’m not your mother, I was just the housemaid.’”¹⁶¹

Or consider the encounter of the young Elie Wiesel—at the actual age of fifteen—with the infamous Dr. Mengele at Auschwitz:

We continued to walk until we came to a crossroads. Standing in the middle of it was . . . the notorious Dr. Mengele. He looked like the typical SS officer: a cruel, though not unintelligent face, complete with monocle. He was holding a conductor’s baton and was surrounded by officers. The baton was moving constantly, sometimes to the right, sometimes to the left. In no time, I stood before him. “Your Age?” he asked, perhaps trying to sound paternal. “I’m eighteen.” My voice was trembling. . . . “Your profession?” Tell him that I was a student? “Farmer,” I heard myself saying.¹⁶²

And under more mundane circumstances:

German Quaker rescuer Olga Halle leaped into the role of “dear relative” when Nazi guards searched the train on which she and an elderly Jewess were traveling. Halle chatted with guards, but her companion was speechless. Thinking quickly, Halle told the guards she was taking her deaf relative to Berlin. The guards wished her a pleasant journey.¹⁶³

2006) (1946). Under some circumstances, a variety of non-lying deceptions could be of value. *See, e.g.*, THOMAS KENEALLY, *SCHINDLER’S LIST: A NOVEL* 229–30 (Touchstone 1993) (1982) (recounting one man’s deliberately prolonged losses at chess to protect Jewish prisoners from a particularly sadistic officer).

¹⁶¹ ANNA MIESZKOWSKA, *IRENA SENDLER: MOTHER OF THE CHILDREN OF THE HOLOCAUST* 75 (Witold Zborohowski-Koscia trans., Praeger 2011) (2004); *see also* YAFFA ELIACH, *HASIDIC TALES OF THE HOLOCAUST* 7 (Vintage Books 1988) (1982) (“Shraga, from this moment on, this Jew standing here next to you is your father.”).

¹⁶² ELIE WIESEL, *NIGHT* 29 (Marion Wiesel trans., Hill & Wang ed. 2006) (1958).

¹⁶³ FOGELMAN, *supra* note 159, at 74–75. For an instance of a joint, albeit spontaneously coordinated, deception based on a writing and compounded with an oral lie, *see* ANNE FRANK, *THE DIARY OF A YOUNG GIRL: THE DEFINITIVE EDITION* 29–31 (Otto H. Frank & Mirjam Pressler eds., Susan Mossotty trans., Bantam Books 1997) (1947) (entry of August 14, 1942).

Sometimes lying took the form of forgery or substitution of official documents.¹⁶⁴ There could, of course, be no guarantee that lies told to the Nazis would be more than temporarily effective,¹⁶⁵ if at all.¹⁶⁶ The comprehensive, detailed effect of these lies is beyond our present scope.¹⁶⁷ Against the background of the previously-cited examples, the next section will make more explicit the ways in which lying can uniquely promote the values of and the basic reasons for protecting freedom of speech.

V. THE FUGITIVE SLAVE AND HOLOCAUST EXPERIENCES: LYING AND THE REASONS FOR FREEDOM OF SPEECH

While emphases vary, the basic reasons and purposes for constitutionally protecting the freedom of speech are fairly well established. Professor Kent Greenawalt's listing of these reasons,¹⁶⁸ while more extensive than most, is otherwise fairly representative. Professor Greenawalt recognizes, as significant free-speech values: "autonomy and personality development,"¹⁶⁹ the "recognition of autonomy and rationality" in other people;¹⁷⁰ promotion of the discovery of truth;¹⁷¹ the proper functioning of a liberal political democracy;¹⁷² promoting tolerance and mutual respect;¹⁷³ the "exposure and deterrence of abuses of

¹⁶⁴ See, e.g., MARTIN GILBERT, *THE RIGHTEOUS: THE UNSUNG HEROES OF THE HOLOCAUST* 114 (Owl Books 2004).

¹⁶⁵ See FRANK, *supra* note 163.

¹⁶⁶ See GILBERT, *supra* note 164 (discussing the torture to death of an unknown parish priest who repeatedly denied sheltering a young Jewish girl who, thanks in part to the priest's dying efforts, survived the War).

¹⁶⁷ For an exceptionally valuable documentation of the plainly limited extra-legal attempts to save the lives of Jews, see generally MORDECAI PALDIEL, *THE RIGHTEOUS AMONG THE NATIONS: RESCUERS OF JEWS DURING THE HOLOCAUST* (2007) (focusing on 150 of the 21,310 persons granted, as of January, 2006, the title "Righteous Among the Nations" by Yad Vashem's public commission). For a thoughtful examination of the place of moral rules and standards in the context of the camps, see TZVETAN TODOROV, *FACING THE EXTREME: MORAL LIFE IN THE CONCENTRATION CAMPS* 241-44 (Arthur Denner & Abigail Pollak trans., Metropolitan Books 1996) (1991).

¹⁶⁸ See generally Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

¹⁶⁹ *Id.* at 143.

¹⁷⁰ *Id.* at 150.

¹⁷¹ See *id.* at 130-32; see also William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

¹⁷² See Greenawalt, *supra* note 168, at 145-46.

¹⁷³ See *id.* at 146-47; see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 175-212 (1988).

authority";¹⁷⁴ the protection of vital privacy interests (through speaking or freely declining to speak);¹⁷⁵ along with considerations of "dignity and equality."¹⁷⁶

The first of these values—that of autonomy, personality development, or self-realization,¹⁷⁷—has been presented by Professor Frederick Schauer in the following terms:

The argument is based on the proposition that a person who uses his faculties to their fullest extent, who is all that it is possible to be, is in some sense better off, and in an Aristotelian sense happier, than those whose development is stultified. . . . What is seen as the ultimate goal for man is the fullest use of the capacity to think, the greatest degree of mental exertion; the exploration of the limits of the mind.¹⁷⁸

Depending on the context, one may or may not wish to emphasize purely cognitive considerations when thinking of autonomy and self-realization.

One motivation for lying to escape slavery, for example, might be that of seeking to promote one's autonomy by escaping enforced illiteracy and the cabining of one's cognitive powers within the narrow confines of slave labor. But in many ordinary cases, as Professor David A. Strauss observes,¹⁷⁹ lying may jeopardize the autonomy of the person successfully lied to, by interfering "with a person's control over their own reasoning processes."¹⁸⁰ The person lied to may feel disrespected,¹⁸¹ or more like a manipulated instrument of the liar's will rather than a person.¹⁸² And the effects of lying are in a sense even worse if the victim is never in a position to recognize that he or she has been lied to, and thereby treated in the above fashion.¹⁸³

¹⁷⁴ See Greenawalt, *supra* note 168, at 130, 140–42; see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

¹⁷⁵ See Greenawalt, *supra* note 168; at 147–48.

¹⁷⁶ *Id.* at 152–53. For some classic rhetoric bearing upon the basic purposes of free speech, see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), as well as JOHN STUART MILL, *ON LIBERTY* 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859). For an exceptionally concise and influential account of some of the most fundamental free speech values, see THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 6–8 (1970) (listing "individual self-fulfillment," "advancing knowledge and discovering truth," "participation in decision making by all members of society," and "maintaining the precarious balance between healthy cleavage and necessary consensus").

¹⁷⁷ See *supra* note 169 and accompanying text.

¹⁷⁸ FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 54 (1982).

¹⁷⁹ See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–55 (1991).

¹⁸⁰ *Id.* at 354.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.*

Professor Strauss recognizes, though, that there may well be special circumstances in which lying is not morally wrong.¹⁸⁴ And certainly, in many of the cases discussed here, the fugitive slave hunter or SS interrogator will be keenly aware, in advance, of the possibility of being lied to. That possibility is already built into their thinking. Many processes of reflection involve overcoming various communicative obstacles. It is not obvious how lying to the interrogator must interfere with the interrogator's control over his thinking and reasoning. A perceived lie may certainly re-direct or complicate that thinking or reasoning process. A more thorough search of the house, for example, may be ordered.

In the extreme cases, there would be something morally, if not logically, odd about a slave hunter's or an SS interrogator's complaint that a lie has left the interrogator feeling disrespected, manipulated, and instrumentalized. This is closer to madness than to consistent logic. Would the idea be that in minimally instrumentalizing the slave hunter, one has thereby impaired his ability to utterly re-instrumentalize the fugitive slave? How much respect for the sheltered Jews does he show by executing them upon detection?

In fact, in some such cases, could the lie not reflect the liar's reasonable attempt to prevent the interrogator from forfeiting his status as a conscientious moral agent, if not also from jeopardizing his presumed immortal soul? Imagine, again, a young Nazi officer at the end of the Second World War. Whatever his degree of guilt or complicity otherwise, if the officer is successfully deceived, he is spared any direct involvement in killing. If, on the other hand, he is not successfully lied to, he summarily executes the innocent Jews in sanctuary, along with the members of the sheltering family. From a broader, post-war perspective, what might even that young Nazi officer have ultimately preferred?

If we factor in the autonomy or self-realization and personal development over time of both the sheltered Jews or fugitive slaves, along with that of the sheltering actor and his or her family, any serious concern for these values may well counsel, rather than prohibit, the crucial lie. It is not just crudely maximizing autonomy among the directly affected persons; the value of autonomy is being taken seriously here, in the most meaningful way. For example, ending the life of a discovered Jewish child hardly respects their autonomy and developmental potential. And again, the extreme cases upon which we focus for clarity do not exhaust the broader range of more common cases in which similar conflicts exist.

Or consider the value of promoting the discovery of truth.¹⁸⁵ Unquestionably, to lie to anyone, including an interrogating slave hunter or Nazi officer is, ordinarily, to fail to further the interrogator's true understanding of where his innocent quarry may be found. But on the other hand, such a lie (at least where

¹⁸⁴ See *id.* For further brief discussion of Professor Strauss, see Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1113–14 (2006).

¹⁸⁵ See *supra* note 173 and accompanying text. In unusual cases, as in FRANK, *supra* note 163, certain truths can be conveyed even if the contextually "necessary" lies are ultimately unsuccessful. Even in the case of Anne Frank, though, her diary required some undisturbed time for its composition.

successful), may over time promote the moral truths of the real consequences of slavery—ethnic and religious extermination, and genocide. Also to be factored in are such truths that the liar, the liar's family, and the sheltered slaves or Jews might later have discovered and perhaps shared. To obstruct the social systems of chattel slavery or Nazism, insofar as either amounts distinctively to a truth-suppressive institution, furthers the promotion of the truth.

On at least some similarly modest scale, but with equal moral importance and clarity, lying to a slave hunter or to an interrogating Nazi also promotes the basic free speech values of the promotion of liberal democracy,¹⁸⁶ tolerance and mutual respect,¹⁸⁷ and the restriction of abuses of power.¹⁸⁸ It is possible to argue that lying to the SS fails to display tolerance for, and respect of, the SS. It is likely that the SS will respond to the truth, or even to an unsuccessful lie or deception, by murdering the relatively tolerant liar and the hidden Jews. Such murders necessarily foreclose any act of tolerance or respect by the victims over the course of a natural lifespan. And we might well speculate that becoming a mass murderer of the innocent may impair, rather than promote, any future movement of an SS officer in the direction of tolerance and mutual respect.¹⁸⁹

Or consider, finally, the free speech values of promoting certain relevant privacy interests,¹⁹⁰ and of dignity and equality.¹⁹¹ Can we say, with any real conviction, that lying to the slave hunter or the SS officer has, overall, adverse effects on these free speech values? Or even hopelessly indeterminate mixed results? A successful lie, and even an unsuccessful lie, strikes a blow in such cases for the vital privacy interests of those given sanctuary and of the sheltering family. The interrogator's own privacy interests seem negligible. And a lie to the interrogator counts just as directly as a defense of the equal dignity of the person—contrary to the ideologies of slavery and of Nazism—as almost any other speech we can imagine. Neither slavery nor Nazism was, in contrast, willing to tolerate such values in the realm of speech or action.¹⁹² And again, this will all be true, if to a lesser extent, in less extreme circumstances.

¹⁸⁶ See *supra* note 172 and accompanying text.

¹⁸⁷ See *supra* note 173 and accompanying text.

¹⁸⁸ See *supra* note 174 and accompanying text.

¹⁸⁹ Cf. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–31 (1957) (hypothesizing that people who hold inconsistent opinions often engage in rationalization to reduce the dissonance, making them less likely to confront their opinions and engage in real change).

¹⁹⁰ See *supra* note 174 and accompanying text.

¹⁹¹ See *supra* note 176 and accompanying text.

¹⁹² This overall argument for the free speech value of lying under these and similar circumstances neither takes issue with, nor relies upon, the argument that the benefits of a government's restricting false factual claims, or even lies, are outweighed by the costs of allowing biased and fallible governments to attempt to do so. See, e.g., Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 22 (2008) (arguing it is better to allow Holocaust denial than to attempt to cleanse the world of deniers through government mandate); Lyrissa Barnett Lidsky, *Where's the Harm? Free Speech and The Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1099

VI. CONCLUSION: LYING AND THE PROMOTION OF BASIC FREE SPEECH VALUES

Most typically, and in cases akin to the “Stolen Valor” example of lying about receiving a military medal,¹⁹³ constitutionally protecting the lie is unlikely to substantially promote any of the basic reasons for protecting speech in general.¹⁹⁴ As we have seen,¹⁹⁵ there are also many important cases, extreme and less extreme, in which an intentional lie, on its own, can clearly “pay for itself” in terms of advancing basic free speech values—without reference to problems of legally distinguishing intentional lies from other false statements of fact. Lying can thus substantially and directly advance the basic reasons for protecting free speech.

This result should not be surprising. Granted, a confrontation with a slave hunter or an SS officer typically involves unusually high moral stakes. But the realm of ordinary, private, low-stakes conversation also hints at the same conclusion in its own limited way. A relative who asks, “do you think I look nice?” may permissibly be told, technically, an intentional, reassuring lie in response. No special moral credit would be given to someone who (riskily) answered that question in a deceptive, cleverly evasive way, without technically lying.

It is possible to say that a “lie” in such a case is not really a lie at all, at least where the relative is really more interested in reassurance than in a cold, forthright analysis. Subtle cultural conventions may come into play. Would-be murderers may have forfeited the right to be told the truth but it is far more of a stretch to argue that the potential killer cannot, logically, be lied to at all. The would-be murderer is a communicating person, and wants the truth. A justified lie under such circumstances—whether justified on free speech grounds or not—remains a lie.

We cannot avoid the task of considering the effects of a lie, or of a broad class of lies, on the basic reasons for protecting freedom of speech. In a number of cases, lying promotes those reasons, perhaps in ways sufficient to justify some variable degree of protection under the free speech clause. In such a case, or class of cases, the degree of free speech protection permitted for the lie will largely reflect the moral weight of the various interests at stake.

In particular, the scope of the argument here—that lying can be constitutionally protected—is not confined to cases involving the physical defense

(2008) (“Once Holocaust denial is regulated, it seems that regulation of any sort of historical revision is but a short step away.”).

It should be pointed out, though, that in the context of Holocaust denial or minimization, and very loosely analogous historical claims, the term “lies” is often used in a broader sense than we have employed above, in which the disseminator of (objectively baseless and unjustified) false factual claims may propagate a “lie” he or she believes to be true, by however tortured or irresponsible a process of motivated inquiry and judgment.

¹⁹³ See *supra* notes 3, 27–40 and accompanying text.

¹⁹⁴ This is not to say that the Stolen Valor Act could not be criticized or even struck down from some other perspective, apart from those grounds on which we focus herein.

¹⁹⁵ See *supra* Parts IV.A–B.

of self or others. Lying, of any categorical sort—say, check-kiting—could, under the right circumstances, substantially advance one or more of the basic free speech values. The law should be appropriately sensitive, as plausible cases arise, to arguments for the free speech value of the lie in question. The law certainly should not declare all lies to be without free speech value, or to possess at best only indirect, instrumental free speech value. Nor should the law try to confine instances of lies with substantial free speech value to one or more discrete categories, as in the defense of self or others. Lies with substantial free speech value, whether ultimately worthy of constitutional protection or not, could arise in a variety of contexts, and the law should be sensitive to this possibility.